Alaska Workers' Compensation Appeals Commission

Larry J. Winkelman,
Appellant,

vs.

Wolverine Supply Inc. and Alaska Insurance Guaranty Association,
Appellees.

Final Decision
Decision No. 115 August 25, 2009
AWCAC Appeal No. 08-030
AWCB Decision No. 08-0169
AWCB Case No. 199623284

Appeal from Alaska Workers' Compensation Board Decision No. 08-0169, issued September 19, 2008, at Anchorage, Alaska by southcentral panel members Darryl Jacquot, Chair, Patricia Vollendorf, Member for Labor, and Robert Weel, Member for Industry.

Appearances: Larry Winkelman, pro se, appellant. Michael Budzinski, Russell, Wagg, Gabbert & Budzinski, P.C., for appellees Wolverine Supply Inc. and Alaska Insurance Guaranty Association.

Commission proceedings: Appeal filed October 16, 2008. Notice of Default issued November 12, 2008. Notice and instruction to file affidavit with affiant's signature and notary's signature issued November 13, 2008. Order denying appellant's motion for fee waiver and transcript at commission expense based on indigence, but permitting use of recording in lieu of transcript, issued January 7, 2009. Instruction to file briefs issued January 27, 2009. Appellee's motion to accept late-filed brief granted April 14, 2009. Appellant's motion to allow testimony of Dr. Swanson at oral argument denied April 30, 2009. Oral argument on appeal presented May 29, 2009.

Commissioners: Philip Ulmer, Jim Robison, Kristin Knudsen.

This decision has been edited to conform to technical standards for publication.

By: Kristin Knudsen, Chair.
Jim Robison, Appeals Commissioner, concurring.

Larry Winkelman entered into a settlement agreement with his employer, Wolverine Supply Inc. and its insurer (collectively referred to as Wolverine). The

agreement provided that Winkelman did not waive entitlement, if any, to future medical benefits for a back condition under the Alaska Workers' Compensation Act (Act), but that Wolverine did not waive its right to contest liability for future medical benefits. Winkelman appeals a board decision denying him all further medical care and refusing to set aside the agreement. The commission upholds the board's decision denying a request to set aside the settlement agreement. However, because the order, denying *all* further medical care, does not conform to the decision text, which discusses specific disputed medical care, the commission modifies the order. Winkelman did not learn until the day of hearing argument on appeal that a material medical record he alleges he filed was not actually in the record at the time the board reached a decision, so the commission remands the case to the board with instructions for further proceedings.

1. Factual background and board proceedings.

Larry Winkelman was working as a plumber when he injured his back falling down some stairs in 1996.[1] He was 46 years old at the time of the injury.[2] Appellant moved to Minnesota and came under the care of Thomas Balfanz, M.D., and David Freeman, M.D. Wolverine paid temporary disability compensation, permanent partial disability compensation, and 18 months of retraining as a machinist.[3]

In October 2000, four years after the injury, Winkelman settled his claim.[4] Winkelman was represented by Chancy Croft, an experienced workers' compensation attorney.[5] He accepted $35,000 in

> full and final settlement and payment of all compensation, regardless of its nature, including compensation for temporary total disability, temporary partial disability, permanent partial impairment, permanent total disability, penalties, interest, costs, or reemployment benefits to which the employee might be presently due or might become due at any time in the future

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1 R. 0001.

2 *Id.*

3 R. 0046-47, 0107.

4 R. 0105-113.

5 R. 0072, 0107.

> pursuant to the terms and provisions of the Alaska Workers' Compensation Act.[6]

Part of the settlement stated:

> The parties agree that the employee's entitlement, if any, to future medical benefits for his neck and low back condition under the Alaska Workers' Compensation Act is not waived by the terms of this agreement, and that the right of the employer to contest liability for future medical benefits is also not waived by the terms of this agreement. However, the parties agree to waive all medical benefits related to the employee's dental problems.[7]

An affidavit appended to the agreement signed by the employee includes this statement: "No representations or promises have been made to me by the employer or carrier which have not been set forth in this document."[8] The settlement was approved by the board on October 23, 2000.[9]

In 2005, a dispute arose regarding payment of massage and pool therapy. Winkelman submitted a list of massage therapy appointments from January 10, 2005, to November 29, 2005, for reimbursement.[10] After Wolverine controverted reimbursement,[11] Winkelman submitted a note from Dr. Freeman that said:

> Mr. Winkelman suffers from chronic pain of his upper back that does require massage and pool therapy for his continued activities of daily living. It is likely that he will never be without this necessity. If you should require any further information, please feel free to contact me.[12]

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6 R. 0109.

7 R. 0109-10.

8 R. 0112.

9 R. 0113.

10 R. 0203.

11 R. 0048.

12 R. 0202.

On January 12, 2006, Winkelman filed a claim for temporary total disability, permanent total disability, penalty, and interest, as well as medical and transportation benefits.[13]

Wolverine asked for an employer medical examination, which was performed June 5, 2006, by John Swanson, M.D.[14] He opined that massage and pool therapy for the remainder of appellant's life was "neither reasonably effective nor necessary for the process of recovery from the lumbar strain since it was resolved by 04/12/97."[15]

The board sent Winkelman to a second independent medical examination by Paul Puziss, M.D.[16] Dr. Puziss also opined that appellant was medically stable and that "[t]reatment recommended by Dr. Freeman, including ongoing lifetime massage and pool therapy or other modalities, clearly are unreasonable and are not going to be effective, nor are they necessary for the process of recovery, . . . The treatment . . . is not an acceptable medical option [in] this case."[17]

The board heard the claim on April 17, 2008.[18] Winkelman appeared telephonically.[19] The board found that Winkelman did not assert that there was any misrepresentation by an agent of the employer or duress.[20] The board found that Winkelman's belief that he was promised medical benefits, including massage and pool therapy, for life was a mistake on his part.[21] The board concluded the settlement agreement could not be set aside.[22]

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13 R. 0120-21. The claim was dated Dec. 27, 2005.

14 R. 0609-0630.

15 R. 0628.

16 R. 0941-57.

17 R. 0955, 0954.

18 *Larry J. Winkelman v. Wolverine Supply Inc.*, Alaska Workers' Comp. Bd. Dec. No. 08-0169, 1 (Sept. 19, 2008) (D. Jacquot, chair).

19 *Id.*

20 *Id.* at 16.

21 *Id.*

22 *Id.*

The board then considered the claim for medical benefits.[23] It applied the presumption analysis, finding that Winkelman raised the presumption of compensability, and finding Wolverine rebutted the presumption.[24] The board then required Winkelman to prove his claim for medical benefits was compensable by a preponderance of the evidence.[25] The board found he had not done so. It found that Dr. Freeman's opinion was entitled to little weight, and that the opinions of Dr. Puziss and Dr. Swanson were more credible.[26] The preponderance of the evidence, the board found, "supports our conclusion that the employee's ongoing massage and pool therapy for his low back or cervical complaints are no longer related to his 1996 strain."[27] The board found Winkelman was not credible.[28] The board concluded that the "claims related to his ongoing medical benefits (massage and pool therapy), for his 1996 injury must be denied and dismissed."[29] In its order the board wrote, "The employee's claim for continued medical treatment, massage and pool therapy is denied and dismissed."[30]

2. Standard of review.

The commission must uphold the board's findings of fact if substantial evidence in light of the whole record supports the findings.[31] The commission does not consider evidence that was not in the board record when the board's decision was made.[32] A

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23 *Id.*

24 *Id.* at 17-18.

25 *Id.* at 18.

26 *Id.* at 18-19.

27 *Id.* at 19 (emphasis in original).

28 *Id.*

29 *Id.*

30 *Id.* at 19.

31 AS 23.30.128(b).

32 AS 23.30.128(a).

board determination of the credibility of testimony of a witness who appears before the board is binding upon the commission.[33]

However, the commission must exercise its independent judgment when reviewing questions of law and procedure within the Act.[34] The question whether the quantum of evidence is substantial enough to support a conclusion in the contemplation of a reasonable mind is a question of law.[35] If a provision of the Act has not been interpreted by the Alaska Supreme Court, the commission draws upon its specialized knowledge and experience of workers' compensation to adopt the "rule of law that is most persuasive in light of precedent, reason, and policy."[36]

3. Discussion.

a. The board's finding that medical treatment in the form of massage and pool therapy is not reasonable and necessary medical treatment is supported by substantial evidence.

On appeal, Winkelman does not challenge the board's determination that the presumption of compensability was overcome by the opinions of Dr. Puziss and Dr. Swanson, which directly contradict Dr. Freeman's opinion that the massage and pool therapy are necessary and reasonable medical treatment for the injury.[37] He asserts that the board did not carefully evaluate the evidence and the "facts the board

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[33] AS 23.30.128(b).

[34] *Id.*

[35] *Land & Marine Rental Co. v. Rawls*, 686 P.2d 1187, 1188-89 (Alaska 1984).

[36] *Guin v. Ha,* 591 P.2d 1281, 1284 n.6 (Alaska 1979).

[37] The board correctly noted that the presumption established in AS 23.30.120(a) may be overcome by substantial evidence that either provides an alternative explanation that would exclude work as a legal cause of the need for treatment or substantial evidence that directly eliminates the reasonable possibility that the work is the legal cause of the need for treatment. *Winkelman,* Bd. Dec. No. 08-0169 at 17. The board also recognized that "[a]n employer may rebut the presumption of compensability by presenting expert medical opinion evidence the work was probably not a cause of the claimed condition." *Id.* (citing *Big K Grocery v. Gibson*, 836 P.2d 941, 942 (Alaska 1992)).

chose to use are half truths at best. The board and state need to use all the facts in a case and not mix and match."[38]

Instead, appellant attacks the weight and credibility of the medical evidence against his claim,[39] pointing in particular to his belief that he had no pre-existing condition.[40] He argues that Dr. Swanson's reference to the Chingford study demonstrates a fundamental misunderstanding of his condition: "If this England study were factual I would be in a wheel chair right?"[41] He argues that Dr. Puziss and Dr. Swanson "are orthopedic specialist's not MD doctors. Therefore their comments about Diabetes being the problem is speculative and misleading at best."[42] In short, failure to understand his condition lessens the credibility of their treatment opinions.

Winkelman was injured in 1996; he filed his claim January 12, 2006. From two years after the injury, the board has greater discretion to authorize indicated medical treatment as the process of recovery may require and may choose among reasonable,

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[38] Appellant's untitled notice of appeal filed Oct. 16, 2008, 1. *See also* Appellant's Notice of Appeal filed Nov. 12, 2008, (stating the grounds for appeal are "to look at the facts & truths of what has happened not rewritten half-truths."). Appellant's argument that all the facts and evidence should be looked at is an acknowledgement that the presumption had been overcome. Dr. Puziss and Dr. Swanson both opined that the 1996 injury was no longer a substantial factor in any need for on-going treatment. R. 0955, 0629. This is sufficient evidence to overcome the presumption. *See Big K Grocery*, 836 P.2d at 942 ("It has always been possible to rebut the presumption of compensability by presenting a qualified expert who testifies that, in his or her opinion, the claimant's work was probably not a substantial cause of the disability.").

[39] Appellant's Conclusion of Br. of Appellant (Reply Br.) filed Apr. 13, 2009, 6 (arguing board's decision "was based on misstated facts, false statements and at best dime store opinions" and that opinions of Drs. Puziss, Swanson, and Smith "should be disregarded as the board did no [sic] give any weight to any doctors and evidence that was pointed out.").

[40] Appellant's Br. 2.

[41] *Id*.

[42] *Id.* at 1.

competing, medically acceptable alternatives.[43] If the board makes a determination of the weight to be given to the medical evidence, that determination is conclusive even if there is conflicting evidence in the record or the evidence is susceptible to contrary conclusions.[44] The legislature made the board the "trier of fact" in workers' compensation claim proceedings. The board's decision as to how much weight should be given one physician over another will not be disturbed by the commission unless review of the entire record leaves the commission with a definite and firm impression that a mistake was made.[45]

The mistake the commission refers to above is not the kind of mistake appellant argues the board made in his case, for example, relying on the wrong doctor's opinion or failing to credit his testimony. The commission will uphold the board's findings of fact if the board had sufficient evidence in the record to support the findings, even if the commission would have found other evidence more persuasive. The commission will not act because the board failed to rely on the largest or most impressive medical evidence or most knowledgeable physician; but, the commission will act if the evidence

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[43] *Jones v. Frontier Flying Serv.*, *Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 018, 23 (Sept. 7, 2006) (quoting *Phillip Weidner & Associates v. Hibdon*, 989 P.2d 727, 731 (Alaska 1999)).

[44] AS 23.30.122.

[45] *Jones,* App. Comm'n Dec. No. 018 at 26. A trial court, sitting as trier of fact, may be reversed on appeal when "the entire record demonstrates that the controlling findings of fact are clearly erroneous or that the trial court abused its discretion." *Peterson v. Swarthout*, _____ P.3d ____, 2009 WL 2477752, Slip Op. No. 6398, 5 (Alaska, Aug. 14, 2009). A finding of fact is clearly erroneous if "after a review of the entire record, [the reviewing court is] left with the definite impression that a mistake has been made." *Id.* at 5-6. *See also Smith v. University of Alaska, Fairbanks,* 172 P.3d 782, 793 (Alaska 2007) ("A legal determination that the evidence is sufficient to support a proposition is distinct from assigning weight to a particular piece of evidence. Findings related to weight are within the province of the fact-finder, which is the board in workers' compensation cases.") (citations omitted).

the board chose to rely on was not substantial; i.e., the evidence was insufficient as a matter of law to support the board's findings of fact.[46]

Appellant asserts the board erred by accepting opinions he characterized as "dime store opinions." However, the board explained it found Drs. Puziss and Swanson "conducted thorough and comprehensive reviews of the . . . medical record" and that "their opinions and diagnoses [were] logical and well-founded."[47] The board gave little weight to the December 23, 2005, "generic report/opinion of Dr. Freeman" which the board found "does not have the cohesiveness of the comprehensive diagnoses rendered by Drs. Swanson and Puziss."[48] The December 23, 2005, report by Dr. Freeman is three sentences long. It does not say that the 1996 injury caused, or is a substantial factor in bringing about, the requirement of "massage and pool therapy for his continued activities of daily living."[49] It contains no current description of the patient's complaints, no physician's findings on examination, no diagnosis, and no statement of relationship to the injury. 8 AAC 45.120(k) states that the board will, in its discretion, give less weight to written medical reports that do not include such information.[50]

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[46] *Moore v. Afognak Native Corp.,* Alaska Workers' Comp. App. Comm'n Dec. No. 087, 7 (Aug. 28, 2007), (citing *McGahuey v. Whitestone Logging, Inc.*, Alaska Workers' Comp. App. Comm'n Dec. No. 054, 6 (August 28, 2007)).

[47] *Winkelman,* Bd. Dec. No. 08-0169 at 19.

[48] *Id.* at 18.

[49] R. 0202.

[50] 8 AAC 45.120(k) provides:

> The board favors the production of medical evidence in the form of written reports, but will, in its discretion, give less weight to written reports that do not include
> (1) the patient's complaints;
> (2) the history of the injury;
> (3) the source of all facts set out in the history and complaints;
> (4) the findings on examination;
> (5) the medical treatment indicated;
> (6) the relationship of the impairment or injury to the employment;

Drs. Puziss and Swanson provided complete reports that the board found were "logical and well-founded,"[51] but Dr. Freeman's letter was not a complete report under 8 AAC 45.120(k). The board's decision to give Dr. Freeman's letter less weight because it lacked cohesiveness and comprehensiveness was well within the board's discretion.

The board did not apply improper factors in weighing competing medical opinions. The commission is not definitely and firmly convinced that the board made a mistake while weighing the evidence that, if the mistake had been made by a jury in a civil action, would require setting aside or reversing the jury's verdict.[52] The reports of Drs. Puziss and Swanson provide substantial evidence, evidence a reasonable mind might rely upon, to make a finding that a lifetime allowance of pool therapy and massage is not reasonable medical care necessary for the process of recovery from appellant's 1996 injury. The commission must uphold the board's findings where, as here, they are supported by substantial evidence in light of the whole record.

b. The board's order requires modification because a clerical error creates confusion between the board's decision and its order.

The commission's understanding of the issues the parties brought before the board for decision, and review of the decision text, revealed a small, but significant, clerical error in the board's order.

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(7) the medical provider's opinion concerning the employee's working ability and reasons for that opinion;
(8) the likelihood of permanent impairment; and
(9) the medical provider's opinion as to whether the impairment, if permanent, is ready for rating, the extent of impairment, and detailed factors upon which the rating is based.

[51] *Winkelman,* Bd. Dec. No. 08-0169 at 19.

[52] AS 23.30.122. "The findings by the board are subject to the same standard of review as a jury's findings in a civil action."

Winkelman filed his claim on a form provided by the board.[53] The form includes a check box on page two, box 24. The claim form does not invite the claimant to identify disputed medical treatment he or she seeks. Winkelman simply checked box 24-e without describing the specific benefit he sought.[54]

The record shows, and the parties do not dispute, that their disagreement arose over the payment of bills for massage and pool therapy. The controversion filed December 22, 2005, was limited to "reimbursement of massage therapy," "gym membership," and related mileage.[55] Wolverine's answer to the claim for medical benefits denies liability "to the extent" the claimed benefits exceed the frequency guidelines, lack physician prescription, and fail to comply with statutory and regulatory report requirements.[56] The April 28, 2006, letter from Wolverine's counsel to appellant does not suggest that Wolverine took the position that no medical treatment of any kind for the injury would be covered in the future.[57]

On the other hand, following Dr. Swanson's report, Wolverine filed a renewed controversion on July 21, 2006, of "all medical and related benefits after 4/12/1997,"[58] but did not file an amendment of its answer to the claim. In the last prehearing conference before the hearing on the claim, the issues listed for hearing include

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[53] 8 AAC 45.050(b)(1), Form 07-6106. Part of the form is illustrated below.

24. CLAIM IS MADE FOR		
a. ☐Temporary Total Disability From Through	e. ☐Medical Costs (state amount requested) $	i. ☐ Penalty (state amount requested) $
From Through	f. ☐Transportation Costs (state amount requested) $	j . ☐ Interest $
From Through	g. Review of Reemployment Benefit Decision (1) ☐ Eligibility (2) ☐ Plan Review (3) ☐ Employee Cooperation (4) ☐ Other (Give details and amount requested in #17 above)	k. ☐ Unfair or frivolous controvert (denial)
b. ☐ Temporary Partial Disability From Through		l. ☐Attorney's Fees and Costs $
c. ☐Permanent Total Disability From Through		m. ☐ Death Benefits
d. ☐Permanent Partial Impairment	h. ☐ Compensation Rate (Gross Weekly Earnings) Complete to #25 below	n. ☐Other (Give details and amount requested in #17 above)

[54] R. 0121.

[55] R. 0048.

[56] R. 0126.

[57] R. 0131.

[58] R. 0050.

"medical costs from approximately 2005 forward."[59] Yet, the text of the prehearing conference discussion of Wolverine's defenses is limited to the massage and pool therapy issues. The summary contains a brief reference to "ER's 07/19/06 controversion notice" in this section, but includes no text summarizing or explaining the significance of the denial of all medical benefits, in marked contrast to the discussion of the pool therapy and massage.[60]

At hearing, Wolverine focused on its assertion that massage and pool therapy benefits were not related to the 1996 injury – and that, even if they were covered, no conforming treatment plan had been filed and the number of visits exceeded the board's regulations on repetitive treatment. The hearing brief filed by Wolverine states, "The issue in this case is whether Dr. Freeman's recommendations for lifetime massage on a bi-monthly basis and daily pool therapy are necessary and reasonable medical and related benefits related to the 1996 injury."[61] Winkelman's hearing brief similarly identifies the issue: "My medical records will show that the need for on-going pool/water therapy and regular massage therapy with on-going at-home stretching exercise program is real and necessary."[62]

The board stated the issues it would decide as, "Whether the employee's ongoing medical care is reasonable and necessary, and related to his 1996 injury."[63] The employer medical examiner and the second independent medical evaluator gave opinions on both questions: whether the 1996 injury required future medical treatment of any type and whether past and on-going pool therapy and massage were required by the 1996 injury.[64] However, despite the broad question in the statement of the issues,

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59 R. 1164.

60 R. 1165.

61 R. 0155-56.

62 R. 0245.

63 *Winkelman,* Bd. Dec. No. 08-0169 at 10.

64 *See, e.g.,* R. 0628 (Dr. Swanson, "[N]either massage nor pool therapy are accepted medical options . . . ."), R. 0629 (Dr. Swanson, "No further treatment is indicated for the claimed injury. . . ."), R. 0954 (Dr. Puziss, "Treatment recommended

the decision text focused on the narrow question of massage and pool therapy:

> We find that the preponderance of the medical evidence supports our conclusion that the employee's ongoing massage and pool therapy for his low back or cervical complaints are no longer related to his 1996 strain. . . . We conclude that the employee's claims related to his ongoing medical benefits (massage and pool therapy), for his 1996 injury must be denied and dismissed.[65]

The board's decision text describes the claim as one for "ongoing massage and pool therapy" and parenthetically describes the "ongoing medical benefits" as "massage and pool therapy." No other medical benefits (e.g., periodic doctor visits, medication) are mentioned in the board's decision. However, the board's order lists, rather than parenthetically describes, the benefits denied: "The employee's claim for continued medical treatment, massage and pool therapy is denied and dismissed." The lack of a comma after the word "therapy" converts the phrase "continued medical treatment, massage and pool therapy is denied" to a list of benefits denied instead of the limiting parenthetical description that results from the insertion of a comma: "continued medical treatment, massage and pool therapy, is denied." Because the board's decision text clearly describes the medical benefits denied as "massage and pool therapy," the commission concludes that the board intended to deny the specific disputed medical benefits: treatment by massage and pool therapy.

The board's regulations include no equivalent to Alaska Rule of Civil Procedure 60(a) permitting the board to correct clerical errors resulting from oversight or omission during the pendency of an appeal to the commission. But, the commission has authority to modify the board's order.[66] Discovery of plain errors of law or fact on

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by Dr. Freeman . . . clearly are unreasonable and are not going to be effective. . . ."), R. 0955 (Dr. Puziss, "No further treatment is indicated, including medications . . . .").

[65] *Winkelman,* Bd. Dec. No. 08-0169 at 10.

[66] AS 23.30.128(d) authorizes the commission to "affirm, reverse, or modify a decision or order upon review."

review may require commission restraint where the parties had no notice of the error.[67] However, neither restraint nor remand is necessary here because the board's decision is clear. While appellant's understanding of the board's order was imperfect, appellees understood the broadening effect of the omitted comma, because they characterized the board's order as denying "claims for ongoing medical benefits for his low back and cervical complaints,"[68] and as a "decision denying liability for further medical treatment. . . ."[69] Correction of clerical errors, such as a missing comma, should not wait for proceedings on remand where the error, if it persists, may have a significant impact. Therefore, the commission will modify the board's order to correct a clerical error, an omitted comma, in order to conform the board's order to the board's decision.[70]

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[67] Whether an error is a clerical error or a "judicial error" is a matter of law. *See DeVaney v. State ex rel. DeVaney*, 928 P.2d 1198, 1200 (Alaska 1996). "Plain error exists where an obvious mistake has been made which creates a high likelihood that injustice has resulted." *Owen M. v. State, Office of Children's Servs.*, 120 P.3d 201, 203 (Alaska 2005). Generally, the commission will not reverse a board decision based on points not raised before the board and asserted as board error on appeal; s*ee Great W. Sav. Bank v. George W. Easley Co.*, 778 P.2d 569, 579 (Alaska 1989) (holding error not raised in the trial court and not raised on appeal is not grounds for reversing the judgment appealed); but it may consider a question raised for the first time on appeal if it reveals plain error. *See Hoffman Constr. Co. of Alaska v. U.S. Fabrication & Erection, Inc.*, 32 P.3d 346, 355 n.29 (Alaska 2001) (indicating claim waived by being raised for the first time on appeal is still subject to review for plain error).

[68] Br. of Appellees 14.

[69] *Id.* at 21.

[70] In *Velderrain v. State, Div. of Workers' Comp.,* Alaska Workers' Comp. App. Comm'n Dec. No. 065, 2007 WL 4548297 (Nov. 29, 2007), and *Hope Community Resources v. Rodriguez*, Alaska Workers' Comp. App. Comm'n Dec. No. 041, 2007 WL 1523397 (May 16, 2007), the commission focused on the decretal language (i.e., the language of the board's order) to determine if the board's decision was final and appealable, guided by the Supreme Court's statement that a reviewing court should "look to the substance and effect, rather than form, of the rendering court's judgment, and focus primarily on the operational or 'decretal' language therein" when determining if a decision is final. *Ostman v. State, Commercial Fisheries Entry Comm'n*, 678 P.2d 1323, 1327 (Alaska 1984) (quoting *Greater Anchorage Area Borough v. City of Anchorage*, 504 P.2d 1027, 1030-31 (Alaska 1972)). Here, however, the decision text is clear, but the order creates ambiguity. Correcting the clerical error by inserting a comma makes the order consistent with the board's decision and eliminates confusion.

c. In view of appellant's belated discovery that documents he relied on were missing from the record, remand is ordered to allow the board to determine if the board lost material evidence before hearing and if modification is required.

Appellant stated in oral argument to the commission that, when he reviewed the commission record in person to prepare for oral argument on the day of the appeal hearing, he could not find a particular medical record.[71] He asserted he had believed the board had the record when his claim was heard because he had mailed it to the board and opposing party. The record, according to appellant, "states in there the factual fracture of the spine, not a muscle spasm, so on and so forth." While he conceded that one physician letter was submitted "a little bit late – not on time," the record showing a fracture was sent to the board "in plenty of time."

He stated he "went through the board's notes [the record on appeal] this morning and there's no letter in there." He asserted he has "evidence that somebody signed for it. Where it went from there I don't know." He asserted he had the green return receipt cards at home. He stated that the day of the hearing of oral argument before the commission was the first day he knew the board did not have the record [establishing his spine was fractured] because he did not come to Alaska to review the board record and he did appear in person for his hearing before the board.

Much of appellant's argument below and before the commission was based on an assertion that the opposing physician opinions are mistaken because he did not have pre-existing spondylosis, arthritis, and degenerative disc disease. He asserts he suffered a "fracture" of the lumbar spine in the injury and the board and physicians ignored this information. Therefore, a medical record of a "fracture," if it exists, is relevant and material to appellant's claim for benefits.

If appellant can establish that the record exists, and that he mailed it to the board (and opposing counsel) in time to arrive at least 20 days before the hearing, the record may have been overlooked because it was misfiled or lost. Whether the record

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[71] Described as a letter from a chiropractor, Dr. Langen or Langdon.

would establish a mistake of fact, or that such a mistake requires modification, is not a question that the commission can decide.[72] The commission notes that appellant states he filed a petition for modification under AS 23.30.130;[73] the commission agrees to remand this case to the board to determine if appellant's evidence establishes sufficient grounds for modification under AS 23.30.130.

d. Appellant failed to establish board error on his claim to set aside the settlement agreement.

Appellant argues that the settlement agreement was an agreement that he would have the medical care he claimed for the rest of his life. He does not argue that words in the agreement specifically create a right to lifetime massage and pool therapy, but he argues that the insurer knew his physicians had recommended massage and pool therapy shortly after the agreement was entered into, this therapy was paid for a number of years, and that his need for the medical care had not changed when it was

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[72] Even if a fracture exists, the unanswered question is if its existence would result in Dr. Puziss or Dr. Swanson changing his opinion, i.e., whether existence of a fracture would be the kind of fact that might change the outcome of the opinion on continuing need for treatment by pool therapy and massage. Appellant does not argue that the physicians should have found the fracture; rather, he argues the medical records (and their assumptions based on the records) are wrong because this information has been lost from his medical history.

[73] AS 23.30.130(a) provides:

> Upon its own initiative, or upon the application of any party in interest on the ground of a change in conditions, including, for the purposes of AS 23.30.175, a change in residence, or because of a mistake in its determination of a fact, the board may, before one year after the date of the last payment of compensation benefits under AS 23.30.180, 23.30.185, 23.30.190, 23.30.200, or 23.30.215, whether or not a compensation order has been issued, or before one year after the rejection of a claim, review a compensation case under the procedure prescribed in respect of claims in AS 23.30.110. Under AS 23.30.110 the board may issue a new compensation order which terminates, continues, reinstates, increases, or decreases the compensation, or award compensation.

controverted. He also argues that he is now permanently, totally disabled and this is a change in condition that makes the settlement agreement unfair.

The settlement agreement reflects that a disagreement over future medical care existed when the parties made the settlement:

> Finally, the employee seeks payment of past medical expenses for his neck and dental problems and future medical expenses related to his neck and low back conditions. The employee relies upon the medical reports of his treating physician, Dr. Thomas Balfanz, the Board's SIME physician, Dr. Neil Pitzer, and dentist, Dr. Rachel Geiger. Mr. Winkelman does not agree with the position of the employer/carrier described in this section and his signature on this settlement document does not imply agreement.
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> In regards to medical benefits, the employer denies the employees entitlement to additional medical treatment other than attendance at a pain clinic recommended by Drs. Balfanz, Smith, and Pitzer. The employer/carrier deny the employee's claim that his recent dental problems are related to his industrial injury. The employer/carrier would rely upon the EIME reports of Dr. Douglas Smith.[74]

The evidence in the board record also reflects a difference of medical opinion. A September 30, 1999, report from Dr. Balfanz states that he does not "feel that [he has] anything further to offer [Mr. Winkelman], unfortunately, from a rehab standpoint."[75] He also described "an extended discussion today regarding his situation as it pertains to work as well as a discussion once again about my recommendations for continued use of the pool as well as stretching exercises."[76] On the other hand, Dr. Smith said, "I am not aware of any specific future treatment relative to physical therapy, exercise, medication, surgery, or chiropractic treatment that would predictably improve his level of function."[77] Dr. Smith also commented that, on occasion, "when people have a

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74 R. 0108-09.

75 R. 0418.

76 *Id.*

77 R. 0167.

'chronic pain syndrome' involvement that they benefit from psychological evaluation, counseling and possibly anti-depressant medication."[78]

Dr. Pitzer, the board's second independent medical evaluator, recorded that Winkelman reported he was attending two hours per day of pool therapy at a local community center.[79] Dr. Pitzer opined that it was

> unlikely that further treatment will give Mr. Winkelman much benefit from a rehabilitation standpoint. I did discuss with him briefly alternative medication trials . . . . It is reasonable to consider a one time psychological evaluation for Mr. Winkelman to see if he would be a candidate for a chronic pain rehab program.[80]

There was no medical agreement on Winkelman's future need for care for his injury. In such situations, parties to workers' compensation settlements commonly reserve their rights: an employee to file claims for medical benefits, and the employer to controvert his claims, leaving the board to decide future disputes as they arise.

The board found that Winkelman had not alleged fraud or duress by Wolverine in obtaining the settlement. In oral argument, appellant argued the insurer entered into the settlement without intending to perform it by providing him future medical care. In effect, he argues that this was a misrepresentation.

The record shows the parties had disputed medical treatment before the agreement was signed. Differing opinions were offered by physicians; these are summarized in the agreement. The settlement agreement does not contain an agreement by the employer to be liable for *any* medical care; instead, it provides that "the employee's entitlement, *if any*, to future medical benefits for his neck and low back condition under the Alaska Workers' Compensation Act is not waived" and that "the right of the employer to *contest liability* for future medical benefits is also not waived by the terms of this agreement."[81] The agreement provides that the employer agrees that

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78 *Id*.

79 R. 0499.

80 R. 0502-03.

81 R. 0109-10 (emphasis added).

the Act will continue to govern the employer's liability for treatment and the employee has not waived any entitlement to treatment, but the employer does not give up the right to controvert treatment or ask the board to decide if it is liable under the Act. The insurer made no promises except to be bound by the Act in providing treatment; it made no representation in the agreement of its intent, or lack of intent, to contest medical treatment in the future.

The board found that appellant "never mentioned any allegation of material misrepresentation involved with executing the C&R."[82] A review of the record, and recording of the hearing, revealed appellant provided no evidence to the board that counsel for, or an agent of, the other party to the settlement made a material misrepresentation of fact to him regarding the insurer's intent to pay pool therapy and massage treatment for the rest of appellant's life, which induced him to agree to the settlement, and upon which he was justified in relying.[83] The board also found that the employee was represented by "very competent counsel" in negotiating the settlement.[84] The commission concludes that the board did not err in refusing to set aside the settlement agreement.[85]

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[82] *Winkelman,* Bd. Dec. No. 08-0169 at 16.

[83] *Seybert v. Cominco Alaska Exploration,* 182 P.2d 1079, 1094 (Alaska 2008); *see also Smith v. CSK Auto, Inc.*, 204 P.3d 1001, 1008 (Alaska 2008) (holding a "misrepresentation is a statement that is not in accord with the facts.").

[84] *Winkelman,* Bd. Dec. No. 08-0169 at 14. *Compare Smith*, 204 P.2d at 1011-12 (discussing Smith's absence from the hearing on his settlement and failure of his non-attorney representative to present evidence).

[85] Appellant's argument that increased disability is a change of condition that justifies voiding the settlement is without merit. The agreement states that the "employee's injuries and disabilities . . . are or may be continuing and progressive in nature and extent of said injuries and resulting disabilities may not be fully known. . . ." Appellant agreed to "release the employer and its . . . carrier from any and all liability arising out of . . . as yet undiscovered disabilities . . . associated with" the work injury. *Winkelman*, Bd. Dec. No. 08-0169 at 9. In effect, he argues he did not know he would become more disabled when he agreed to the settlement, so he made a mistake. *See Smith,* 204 P.2d at 1007-08. Mistake is not grounds to set aside a settlement. *Id.* at 1008 (citing *Olsen Logging Co. v. Lawson*, 856 P.2d 1155, 1159 (Alaska 1993)).

4. Conclusion.

The commission concludes that the board had substantial evidence in light of the whole record to deny the employee's claim for disputed medical benefits, including massage and pool therapy, but the board's decision limited the denial to the disputed massage and pool therapy. The commission concludes that the board's order, through the lack of a comma, expanded the denial to all future medical benefits beyond the language of the decision text. Therefore, the commission MODIFIES the board's order in paragraph 2 to insert a comma after the words "massage and pool therapy" to give effect to the board's decision.

The commission REMANDS this case to the board to allow the board to take up appellant's petition for modification in light of his late discovery that documentary evidence he believed was in the board record was not there. The board may allow appellant to submit evidence that he filed the document in time, but that it was lost or misfiled, and, if the board so finds, the board may determine whether appellant's evidence requires modification of its decision.

The commission concludes that the board did not err in its legal analysis of appellant's claim to set aside the settlement agreement. The commission AFFIRMS the board's order denying the employee's claim to set aside the settlement agreement.

Date: *25 Aug 2009* ALASKA WORKERS' COMPENSATION APPEALS COMMISSION

Signed
Philip Ulmer, Appeals Commissioner

Signed
Kristin Knudsen, Chair

Appellant's argument that the agreement is void because the appellees never intended to perform the agreement care is also without merit. The settlement preserved Winkelman's right to medical care under AS 23.30.095 and Wolverine's right to controvert a claim for medical care. Controversion under such an agreement does not violate the duty to "refrain from doing anything that would injure the right of the other party to receive the benefits of the contract." *Smith*, 204 P.2d at 1010.

Jim Robison, Appeals Commissioner, concurring.

I agree that substantial evidence supports the board's finding that massage and pool therapy is not compensable and that the commission properly upheld the board's decision denying Winkelman's claim to set aside the compromise and release agreement. I also agree that the case should be remanded to allow the board to consider Winkelman's petition for modification due to his late discovery of evidence missing from the board record. Lastly, I agree that the board's order requires modification to clarify that the board denied only massage and pool therapy, not all future medical benefits.

However, I write separately because I believe that even if the board had intended to deny all claims for future medical benefits, it cannot do so under the terms of the agreement. The Supreme Court has held that a workers' compensation compromise and release agreement is a contract "subject to interpretation as any other contract."[86] "Contracts are to be interpreted so as to give effect to the reasonable expectations of the parties, that is, to give effect to the meaning of the words which the party using them should reasonably have apprehended that they would be understood by the other party."[87] Although the conduct of the parties, the contract's purposes and the surrounding circumstances at the time of contract formation may be relevant, "the words of the contract are nevertheless the most important evidence of intention."[88]

In Winkelman's case, the agreement provides in relevant part that:

> The parties agree that the employee's entitlement, if any, to future medical benefits for his neck and low back condition

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[86] *Seybert v. Cominco Alaska Exploration*, 182 P.3d 1079, 1093 (Alaska 2008) (citing *Williams v. Abood*, 53 P.3d 134, 139 (Alaska 2002)).

[87] *Craig Taylor Equip. Co. v. Pettibone Corp.*, 659 P.2d 594, 597 (Alaska 1983) (citations omitted).

[88] *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 712 (Alaska 2003). *See also Kay v. Danbar, Inc.*, 132 P.3d 262, 269 (Alaska 2006) (stating "the words of the contract remain the most important evidence of intention and, unless otherwise defined, are given their 'ordinary, contemporary, common meaning.'") (citations omitted).

> under the Alaska Workers' Compensation Act is not waived by the terms of this agreement and that the right of the employer to contest liability for future medical benefits is also not waived by the terms of this agreement.[89]

By its terms, the agreement specifically reserves Winkelman's right to make a claim for future medical benefits for his neck and low back, and the employer's right to contest liability for those benefits.[90] The board therefore cannot deny all future medical benefits because that would cut off Winkelman's right to make a claim. I believe that the board must allow Winkelman to bring claims for specific medical benefits for his neck and low back. By the same token, the agreement permits Wolverine to contest liability should Winkelman make a claim, leaving it to the board to resolve any disputes within the parameters of the Alaska Workers' Compensation Act.

For these reasons and the reasons stated in the majority's decision, I join in the decision to affirm the board's order refusing to set aside the settlement agreement and denying pool and massage therapy, to modify the board's order to reflect that the board was denying only pool and massage therapy, not all future medical benefits, and to remand to the board to consider the petition for modification.

Date: *8/25/2009*

Signed

Jim Robison, Appeals Commissioner

APPEAL PROCEDURES

This is a final decision on the merits of this appeal from the board's Decision No. 08-0169. The commission modified part of the board's order and affirmed (approved) part of the order. However, this is NOT a final decision on Mr. Winkelman's petition for

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89 R. 0109-110.

90 *See Williams*, 53 P.3d at 144 (noting that "[b]road language in settlement agreements implies that all claims are settled; the parties must specifically state claims that are not settled."); *Martech Constr. Co., Inc. v. Ogden Envtl. Servs., Inc.*, 852 P.2d 1146, 1152 (Alaska 1993) (stating that "the agreement indicates a complete washing of the hands between the parties using as soap blatantly broad language to cover all possible causes of action" and that "although the [claim] was not specifically discharged, neither was it specifically reserved as an independent claim.").

modification. This decision remanded (returned) the case to the board to hear and decide the petition for modification. The board may or may not change its decision. This decision is effective when mailed or otherwise distributed to the parties unless proceedings to reconsider it or seek Supreme Court review are instituted (started). For the date of distribution, look at the certificate of distribution in the box below.

Proceedings to appeal this must be instituted in the Alaska Supreme Court within 30 days of the distribution of a final decision and be brought by a party in interest against all other parties to the proceedings before the commission, as provided by the Alaska Rules of Appellate Procedure. AS 23.30.129.

Other forms of review are available under the Alaska Rules of Appellate Procedure, including a petition for review or a petition for hearing under Appellate Rules. If you believe grounds for other forms of review exist under the Appellate Rules, you should file your petition within 10 days after the date of this decision.

You may wish to consider consulting with legal counsel before filing a petition for review or for hearing or an appeal.

If a request for reconsideration of this decision is timely filed with the commission, any proceedings to appeal, if appeal is available, must be instituted within 30 days after the reconsideration decision is mailed to the parties, or, if the commission does not issue an order for reconsideration, within 60 days after the date this decision is mailed to the parties, whichever is earlier. AS 23.30.128(f). If you wish to appeal or petition for review or hearing to the Alaska Supreme Court, contact the Alaska Appellate Courts immediately:

Clerk of the Appellate Courts
303 K Street
Anchorage, AK 99501-2084
Telephone 907-264-0612

RECONSIDERATION

A party may ask the commission to reconsider this decision by filing a motion for reconsideration as provided in 8 AAC 57.230. The motion requesting reconsideration must be filed with the commission within 30 days after mailing of this decision.

CERTIFICATION

I certify that the foregoing is a complete and correct copy of Alaska Workers' Compensation Appeals Commission Decision No. 115, the final decision on appeal in *Larry J. Winkelman v. Wolverine Supply Inc. and Alaska Ins. Guar. Ass'n*, AWCAC Appeal No. 08-030, dated and filed in the office of the Alaska Workers' Compensation Appeals Commission in Anchorage, Alaska, this *25th* day of *August*, 20 *09*.

Signed
L. Beard, Appeals Commission Clerk

CERTIFICATE OF DISTRIBUTION

I certify that on *8-25-09* a copy of this Final Decision in AWCAC Appeal No. 08-030 was mailed to: L. Winkelman (certified) & M. Budzinski at their addresses of record, and faxed to M. Budzinski, Director WCD, & AWCB Appeals Clerk.

Signed *August 25, 2009*
B. Ward, Deputy Appeals Commission Clerk Date